

ESTTA Tracking number: **ESTTA399136**

Filing date: **03/21/2011**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91198504
Party	Defendant Vantium Capital, Inc.
Correspondence Address	Darin M. Klemchuk Klemchuk Kubasta LLP 8150 N Central Expressway, Suite 1150 Dallas, TX 75206 ipdocketing@kk-llp.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Shannon W. Bates
Filer's e-mail	ipdocketing@kk-llp.com, shannon.bates@kk-llp.com
Signature	/Shannon W. Bates/
Date	03/21/2011
Attachments	2_Motion to Dismiss_032111_FILED.pdf (27 pages)(2407863 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of application Serial No. 77/846,200
For the designation ACQURA
Published in the *Trademark Official Gazette* on August 10, 2010

HONDA MOTOR CO., LTD.	§	
	§	
Opposer,	§	
	§	
v.	§	Opposition No. 91198504
	§	
VANTIUM CAPITAL, INC. D/B/A ACQURA	§	
LOAN SERVICES,	§	
	§	
Applicant.	§	

United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, Virginia 2313-1451

**APPLICANT VANTIUM CAPITAL, INC. D/B/A ACQURA LOAN SERVICES'
MOTION TO DISMISS FOR LACK OF JURISDICTION AND BRIEF IN SUPPORT**

Applicant Vantium Capital, Inc. d/b/a Acqura Loan Services ("Vantium") files this Motion to Dismiss in accordance with Federal Rule of Civil Procedure 12(b)(1) and respectfully requests dismissal of the Notice of Opposition filed by Opposer Honda Motor Co., Ltd. ("Opposer"). Opposer improperly obtained Applicant's consent to file a third extension of time to oppose under false pretenses, and therefore, Opposer's Notice of Opposition should not be considered timely filed. When a Notice of Opposition is not timely filed, the Trademark Trial and Appeal Board ("Board") lacks jurisdiction to hear the opposition proceeding. As such, the above-referenced opposition proceeding should properly be dismissed.

I. FACTUAL AND PROCEDURAL BACKGROUND

Vantium is the owner of U.S. Trademark Application No. 77/846,200 for the mark ACQURA for “financial services, namely, providing consultancy services in the areas of existing mortgage solutions and loan modifications” in International Class 36 (the “ACQURA Application”). The ACQURA Application was filed on October 11, 2009, listing April 7, 2008 as the date of first use in commerce. The ACQURA Application was thereafter approved for publication and published for opposition in the *Trademark Official Gazette* on August 10, 2010.

On September 8, 2010, Opposer filed its first 30-day Extension of Time to Oppose the ACQURA Application, and the Board granted this extension. On October 11, 2010, Opposer filed its second 60-day Extension of Time to Oppose, and the Board granted this extension. On December 8, 2010, Opposer filed its third and final 60-day Extension of Time to Oppose with the consent of Vantium, and the Board granted this extension as well. However, Opposer made material misrepresentations to Vantium in order to obtain Vantium’s consent to the final Extension of Time, thereby buying additional time to prepare its Notice of Opposition.

Opposer’s communications with Vantium have been sporadic and last minute. Near the close of business on December 7, 2010, the day before Opposer’s second extension period expired, Opposer’s counsel called Vantium’s counsel to offer a Co-Existence Agreement and to request Vantium’s consent to a third Extension of Time to Oppose. Opposer’s counsel explained that the Co-Existence Agreement would be reciprocal in nature, whereby each party would agree not to expand use of its mark, or apply to register its mark, in the financial services field where the other party currently operates, i.e., the automotive field for Opposer and the mortgage field for Vantium. Vantium’s counsel agreed to contact Vantium to determine its interest in such a Co-Existence

Agreement and also provided Vantium's consent to file a final Extension of Time, as confirmed by the email correspondence attached hereto as Exhibit A. Vantium would not have consented to another Extension of Time absent Opposer's offer of a Co-Existence Agreement. Instead, Vantium's consent to Opposer's final Extension of Time was premised entirely on the understanding that if Vantium accepted Opposer's offer for a Co-Existence Agreement, the parties would settle the matter on that basis.

On December 8, 2010, Opposer filed its third and final Extension of Time with Vantium's consent. On December 9, 2010, per the email correspondence attached hereto as Exhibit B, Vantium's counsel advised Opposer's counsel that Vantium was amenable to negotiating a Co-Existence Agreement under the proposed reciprocal terms. Vantium's counsel further requested a proposed draft of the Agreement at Opposer's earliest convenience. On December 9, 2010, per the email correspondence attached hereto as Exhibit C, Opposer's counsel responded that she would discuss with her client and be in touch. Thus, Vantium was led to believe that Opposer intended to resolve this matter amicably rather than by opposing the ACQURA Application, especially given that it was Opposer who offered the Co-Existence Agreement.

On January 15, 2011, per the email correspondence attached hereto as Exhibit D, Vantium's counsel contacted Opposer's counsel to inquire about the status of the draft Co-Existence Agreement. On January 19, 2011, per the email correspondence attached hereto as Exhibit E, Opposer's counsel responded that she was discussing the matter with her client, and she would advise Vantium's counsel as soon as possible. Opposer's counsel gave no indication that the parties would not be entering into a Co-Existence Agreement as previously discussed.

After the close of business on February 7, 2011, the deadline for filing the Notice of Opposition, Opposer's counsel called Vantium's counsel to advise that Opposer had filed a Notice of Opposition, which was followed by correspondence received by Vantium's counsel at 7:09 PM that evening, attached hereto as Exhibit F, forwarding the Notice of Opposition as filed that day.

II. ARGUMENTS AND AUTHORITIES

A. Rule 12(b)(1) Requires Dismissal When a Court Lacks Subject-Matter Jurisdiction Over the Case

Motions under Rule 12(b)(1) should be granted where the court lacks the authority to hear the dispute. According to TBMP § 102.02, the Board has jurisdiction over four types of inter partes proceedings: oppositions, cancellations, interferences, and concurrent use proceedings. When an applicant is dissatisfied with an action of the Board on a request for an extension of time to oppose and the opposition has been filed and instituted, the applicant may raise the issue by means of a motion to dismiss the opposition for lack of jurisdiction. TBMP § 211.02.

In the present proceeding, Vantium respectfully submits that the Board lacks jurisdiction to consider the opposition because it was not timely filed. *Cass Logistics Inc. v. McKesson Corp.*, 27 USPQ2d 1075, 1074 n.2 (TTAB 1993). In particular, Opposer's third Extension of Time to file a Notice of Opposition was only approved by the Board based on Vantium's consent, which Opposer obtained under false pretences by offering a Co-Existence Agreement that it never intended to pursue. Therefore, because Opposer improperly obtained an extension to the opposition period, its Notice of Opposition should not be considered timely filed, and this opposition proceeding should not be pending before the Board.

B. Opposer Obtained Vantium's Consent to File a Third Extension of Time Under False Pretenses

Opposer obtained Vantium's permission to file its third and final Extension of Time to Oppose under false pretenses and by making material misrepresentations, which gave Opposer additional time to prepare its Notice of Opposition. Had Vantium known the true intent of Opposer's request for an extension of time, it would not have provided such consent.

Opposer misrepresented to Vantium that a further extension of time was needed to allow the parties to negotiate a Co-Existence Agreement. However, upon receiving such an extension, Opposer instead used up the entire 60-day period to prepare its Notice of Opposition, which it filed at the last possible moment. There is very little evidence to suggest that Opposer ever truly intended to pursue a Co-Existence Agreement with Vantium. The rule states that "the Board will grant a third request for an extension of time only upon written consent or stipulation signed by the applicant or its authorized representative, or a written request by the potential opposer or its authorized representative stating that the applicant or its authorized representative has consented to the request, or a showing of extraordinary circumstances." See 37 CFR § 2.102(c)(3). As reflected by the email correspondence between the attorneys of record in this proceeding, attached hereto as Exhibits A through F, Opposer obtained Vantium's permission to file its final Extension of Time under the premise that the parties would enter a Co-Existence Agreement. Had this premise not existed, then Vantium would have not consented to such an extension and the Notice of Opposition would not have been timely filed.

This Board has entered an order dismissing an opposer's Notice of Opposition in similar circumstances where the Extension of Time to Oppose was filed under fraudulent or false pretenses. See *Central Mfg. Inc. v. Third Millenium Technology, Inc.*, 61 USPQ2d 1210 (TTAB 2001). Therefore, the Board should rule similarly in this case and order a dismissal of Opposer's Notice of Opposition because the Board lacks subject matter jurisdiction to oversee the matter.

III. CONCLUSION AND REQUEST FOR RELIEF

For the above reasons, Vantium respectfully requests entry of an order dismissing Opposer's Notice of Opposition. Vantium requests all other and further relief to which it may be entitled.

Dated: March 21, 2011.

Respectfully submitted,

KLEMCHUK KUBASTA LLP



Shannon W. Bates

Roxana A. Sullivan

8150 N. Central Expressway, Suite 1150

Dallas, Texas 75048

Tel.: 214.367.6000

Fax: 214.367.6001

ipdocketing@kk-llp.com

ATTORNEYS FOR APPLICANT

VANTIUM CAPITAL INC. D/B/A

ACQURA LOAN SERVICES

CERTIFICATE OF TRANSMISSION UNDER TBMP 110

I HEREBY CERTIFY that the foregoing *Motion to Dismiss* with Exhibits A-F is being filed electronically through <http://estta.uspto.gov> via the Trademark Trial and Appeal Board Electronic Filing System

on Monday, the 21st day of March, 2011.



Claudia Alvarado

CERTIFICATE OF SERVICE UNDER TBMP 113

I HEREBY CERTIFY that a true and correct copy of the foregoing *Motion to Dismiss* with Exhibits A-F has been served by First Class U.S. Mail, postage prepaid, on Opposer's counsel at the correspondence address of record, as follows:

Erin M. Hickey
Fish & Richardson P.C.
P.O. Box 1022
Minneapolis, MN 55440-1022

on Monday, the 21st day of March, 2011.



Claudia Alvarado

Exhibit A

From: Shannon Bates <shannon.bates@kk-llp.com>
Subject: **Potential Opposition Against ACQUIRA Mark**
Date: December 7, 2010 6:39:47 PM CST
To: hickey@fr.com

Hello, Erin.

As we discussed, I will contact my client Vantium Capital to investigate whether or not it has any interest in negotiating a simple Co-Existence Agreement with your client Honda Motor Company, and I will let you know as soon as possible. However, if you do not hear back from me by 1pm EST, then you have my consent to file a further 30-day extension of time to oppose.

Best Regards,
Shannon W. Bates

KLEMCHUK KUBASTA LLP

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8150 North Central Expressway, Suite 1150, Dallas, TX 75206

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Exhibit B

From: Shannon Bates <shannon.bates@kk-llp.com>
Subject: Re: Potential Opposition Against ACQUIRA Mark

Date: December 9, 2010 10:32:36 AM CST

To: Erin Hickey <Hickey@fr.com>

Hello, Erin.

We have received confirmation from our client Vantium Capital (Vantium) that it is amenable to negotiating a simple Co-Existence Agreement with your client Honda Motor Company (Honda).

As we discussed on Tuesday, this Agreement should include reciprocal language whereby each party agrees not to expand use of its mark, or apply to register its mark, into the financial services field where the other party currently operates, i.e. the automotive field (Honda) and the mortgage field (Vantium Capital).

Please let me know if you have any questions. Otherwise, please provide the proposed draft Agreement for my review at your earliest convenience.

Best Regards,

Shannon W. Bates

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On Dec 7, 2010, at 8:24 PM, Erin Hickey wrote:

Hi Shannon,

Thank you very much for your quick reply today. We look forward to hearing from you. However, if I don't hear back from you by 1:00 p.m. EST tomorrow, we will proceed with filing a further extension of time to oppose your client's application, with your client's consent. Just to clarify, the further extension of time is for 60 days, not 30 days – it's the only option the USPTO gives us. I will assume this is OK, unless you say otherwise by 1:00 p.m. EST tomorrow.

Again, thanks very much for your cooperation, and we look forward to working with you to resolve this matter.

Best regards,
Erin

From: Shannon Bates [mailto:shannon.bates@kk-llp.com]

Sent: Tuesday, December 07, 2010 7:40 PM

To: Erin Hickey

Subject: Potential Opposition Against ACQUIRA Mark

Hello, Erin.

As we discussed, I will contact my client Vantium Capital to investigate whether or not it has any interest in negotiating a simple Co-Existence Agreement with your client Honda Motor Company, and I will let you know as soon as possible.

However, if you do not hear back from me by 1pm EST, then you have my consent to file a further 30-day extension of time to oppose.

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Exhibit C

From: "Erin Hickey" <Hickey@fr.com>
Subject: **RE: Potential Opposition Against ACQUIRA Mark (Our Ref.: 10691-0445PP1)**
Date: December 9, 2010 12:34:27 PM CST
To: "Shannon Bates" <shannon.bates@kk-llp.com>

Hi Shannon,

Thanks for your e-mail, and again for consenting to a further 60-day extension of time, which we filed yesterday. I will talk with my client, and I will be in touch!

Best regards,
Erin

From: Shannon Bates [mailto:shannon.bates@kk-llp.com]
Sent: Thursday, December 09, 2010 11:33 AM
To: Erin Hickey
Subject: Re: Potential Opposition Against ACQUIRA Mark

Hello, Erin.

We have received confirmation from our client Vantium Capital (Vantium) that it is amenable to negotiating a simple Co-Existence Agreement with your client Honda Motor Company (Honda).

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Please let me know if you have any questions. Otherwise, please provide the proposed draft Agreement for my review at your earliest convenience.

Best Regards,

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Best regards,

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Sent: Tuesday, December 07, 2010 7:40 PM

To: Erin Hickey

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Exhibit D

From: Shannon Bates <shannon.bates@kk-llp.com>
Subject: Re: Potential Opposition Against ACQUIRA Mark (Our Ref.: 10691-0445PP1)
Date: January 15, 2011 4:58:46 PM CST
To: Erin Hickey <Hickey@fr.com>

Hello, Erin.

I am contacting you at the request of my client Vantium Capital to investigate the status of the draft Co-Existence Agreement with your client Honda Motor Company involving the marks ACQUIRA and ACURA, respectively. Can you please advise?

Regards,

Shannon W. Bates

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From: Shannon Bates [mailto:shannon.bates@kk-llp.com]

Sent: Thursday, December 09, 2010 11:33 AM
To: Erin Hickey
Subject: Re: Potential Opposition Against ACQUIRA Mark

Hello, Erin.

We have received confirmation from our client Vantium Capital (Vantium) that it is amenable to negotiating a simple Co-Existence Agreement with your client Honda Motor Company (Honda).

As we discussed on Tuesday, this Agreement should include reciprocal language whereby each party agrees not to expand use of its mark, or apply to register its mark, into the financial services field where the other party currently operates, i.e. the automotive field (Honda) and the mortgage field (Vantium Capital).

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Exhibit E

From: Erin Hickey <Hickey@fr.com>
Subject: RE: Potential Opposition Against ACQUIRA Mark (Our Ref.: 10691-0445PP1)
Date: January 19, 2011 10:02:01 AM CST
To: "Shannon Bates" <shannon.bates@kk-llp.com>

Hi Shannon,

Thanks for your e-mail, and happy New Year! We are discussing the matter with our client, and I will advise you as soon as possible.

Best regards,
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From: Shannon Bates [mailto:shannon.bates@kk-llp.com]
Sent: Saturday, January 15, 2011 5:59 PM
To: Erin Hickey
Subject: Re: Potential Opposition Against ACQUIRA Mark (Our Ref.: 10691-0445PP1)

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Exhibit F

From: Erin Hickey <Hickey@fr.com>
Subject: **RE: Potential Opposition Against ACQUIRA Mark (Our Ref.: 10691-0445PP1)**
Date: February 7, 2011 7:09:36 PM CST
To: "Shannon Bates" <shannon.bates@kk-llp.com>
Cc: <darin@kk-llp.com>, "Anthony Fletcher" <Fletcher@fr.com>, "Tony Dylan-Hyde" <dylan-hyde@fr.com>, "Maryann White" <mwhite@fr.com>
▶ 5 Attachments, 13.0 MB

Hi Shannon,

Further to our conversation today, attached are courtesy copies of the Notice of Opposition, and accompany exhibits, which we filed today. We will send you hard copies in the mail today as well.

Best regards,
Erin

From: Erin Hickey
Sent: Wednesday, January 19, 2011 11:02 AM
To: Shannon Bates
Subject: RE: Potential Opposition Against ACQUIRA Mark (Our Ref.: 10691-0445PP1)

Hi Shannon,

Thanks for your e-mail, and happy New Year! We are discussing the matter with our client, and I will advise you as soon as possible.

Best regards,
Erin

From: Shannon Bates [mailto:shannon.bates@kk-llp.com]
Sent: Saturday, January 15, 2011 5:59 PM

To: Erin Hickey

Subject: Re: Potential Opposition Against ACQUIRA Mark (Our Ref.: 10691-0445PP1)

Hello, Erin.

I am contacting you at the request of my client Vantium Capital to investigate the status of the draft Co-Existence Agreement with your client Honda Motor Company involving the marks ACQUIRA and ACURA, respectively. Can you please advise?

Regards,

Shannon W. Bates

KLEMCHUK KUBASTA LLP

Campbell Centre II

8150 North Central Expressway, Suite 1150, Dallas, TX 75206

214.367.6000 (t) • shannon.bates@kk-llp.com

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On Dec 9, 2010, at 12:34 PM, Erin Hickey wrote:

Hi Shannon,

Thanks for your e-mail, and again for consenting to a further 60-day extension of time, which we filed yesterday. I will talk with my client, and I will be in touch!

Best regards,

Erin

From: Shannon Bates [<mailto:shannon.bates@kk-llp.com>]

Sent: Thursday, December 09, 2010 11:33 AM

To: Erin Hickey

Subject: Re: Potential Opposition Against ACQUIRA Mark

Hello, Erin.

We have received confirmation from our client Vantium Capital (Vantium) that it is

amenable to negotiating a simple Co-Existence Agreement with your client Honda Motor Company (Honda).

As we discussed on Tuesday, this Agreement should include reciprocal language whereby each party agrees not to expand use of its mark, or apply to register its mark, into the financial services field where the other party currently operates, i.e. the automotive field (Honda) and the mortgage field (Vantium Capital).

Please let me know if you have any questions. Otherwise, please provide the proposed draft Agreement for my review at your earliest convenience.

Best Regards,

Shannon W. Bates

KLEMCHUK KUBASTA LLP

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On Dec 7, 2010, at 8:24 PM, Erin Hickey wrote:

Hi Shannon,

Thank you very much for your quick reply today. We look forward to hearing from you. However, if I don't hear back from you by 1:00 p.m. EST tomorrow, we will proceed with filing a further extension of time to oppose your client's application, with your client's consent. Just to clarify, the further extension of time is for 60 days, not 30 days – it's the only option the USPTO gives us. I will assume this is OK, unless you say otherwise by 1:00 p.m. EST tomorrow.

Again, thanks very much for your cooperation, and we look forward to working with you to resolve this matter.

Best regards,
Erin

From: Shannon Bates [mailto:shannon.bates@kk-llp.com]
Sent: Tuesday, December 07, 2010 7:40 PM
To: Erin Hickey
Subject: Potential Opposition Against ACQUIRA Mark

Hello, Erin.

As we discussed, I will contact my client Vantium Capital to investigate whether or not it has any interest in negotiating a simple Co-Existence Agreement with your client Honda Motor Company, and I will let you know as soon as possible. However, if you do not hear back from me by 1pm EST, then you have my consent to file a further 30-day extension of time to oppose.

Best Regards,

Shannon W. Bates

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